No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD and D. W. DAVIS,

Appellees.

APPELLANTS' MEMORANDUM
Regarding Appellees' Reply to Supplemental Brief for Appellants.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

OSCAR SUTRO,
FELIX T. SMITH,
Of Counsel.

Topical Index

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APPELLANTS' MEMORANDUM
Regarding Appellees' Reply to Supplemental Brief for Appellants.

REQUEST FOR LEAVE TO FILE THIS MEMORANDUM.

Libelants' proctor says:

> "The supplemental brief for appellants is to a great extent a repetition of the matters set forth in their opening brief" (Appellees' Reply, pp. 1-2).

Libelants, on the other hand, in their reply have departed to such an extent from the position they adopted in their main brief (*infra,* pp. 3, 4, 9, 11, 12, 15, 16, 18, 19) that we feel that we are justified in asking this court for leave to file this memorandum.

Libelants, having taken for the preparation of their Reply Brief more than twice the time originally allowed by this court, cannot complain that the decision of the case is delayed by the consideration of this memorandum. For the burden imposed upon the court, we humbly crave its indulgence.

The arrangement of the reply is similar to that of libelants' main brief, accordingly we adopt the same arrangement as in our supplemental brief.

A.

Appellees' Brief.

In their main brief libelants made the following direct accusation:

> "Appellant omits mention of the following salient facts:
>
> The testimony of the master shows that the vessel put into the port of San Francisco in distress on February 28, 1920, and that while the vessel was in the harbor of San Francisco arrangements were made for discharging her cargo at California City, on San Francisco Bay, instead of discharging her at Bremerton, Puget Sound, as originally con-

templated under the contract of affreightment (Apostles, p. 65)."

(Appellees' Brief, p. 2.)

In our supplemental brief we pointed out that there was no such omission (Appellants' Supplemental Brief, p. 2; Appellees' Brief, p. 3). Libelants now admit that they made the accusation. The retraction is lame.

"In their opening brief counsel for appellants stated that the 'Benowa' put into San Francisco in distress" (Appellees' Reply, p. 2).

With admirable agility, however, libelants now shift their position and make a different accusation:

"But no reference was made to the fact that the master informed the owners that the vessel was short of provisions" (Appellees' Reply, p. 2).

As we have already pointed out (Appellants' Supplemental Brief, pp. 26-27), and as libelants apparently concede (*infra,* p. 20), the whole matter of provisions was immaterial and responsive to no issue in this case.

Libelants still harp on their straits while in San Francisco (Appellees' Reply, pp. 2, 3, 8). As in their main brief (Appellants' Supplemental Brief, p. 3), there is no citation of the record in support of these general statements, and the fact is that they are unsupported by the record. Indeed, referring to libelant Davis, a native Californian (Apostles, p. 443; Appellants' Supplemental Brief, p. 3), libelants now say:

"It does not appear, however, that he later moved to the East Coast" (Appellees' Reply, p. 3.)

This is precisely our position, and no such fact appearing, the court may well assume that he now resides in California, and not in some Eastern city, as libelants' proctor would have it believe.

Libelants cite the record as showing that Pacific Motorship Company avoided meeting the crew or "any one in their behalf" (Appellees' Reply, p. 5). The record in regard to this incident shows clearly there was no attempt to avoid the issue. As the shipping commissioner says:

> "I rang up the firm * * * at that time, the question was as to how the crew was to be fed" (Apostles, p. 82).

Mr. Moran, the purchasing agent and port steward, had been supplying the provisions (Apostles, p. 183), and the commissioner was referred to him (Apostles, p. 194). In response to the commissioner's request, Mr. Moran called at his office (Apostles, p. 179). At this call, however, the commissioner asked him:

> "Did he propose to discharge the crew and pay them their wages" (Apostles, p. 83).

This was a matter with which Mr. Moran had nothing to do (Apostles, p. 184), and as to which he naturally could not answer the commissioner. On the issue of provisions he answered the commissioner fully (Apostles, p. 180).

Proctor for libelants now attempts to make capital out of the fact that many of the libelants have agreed to an amicable settlement (Appellees' Reply, pp. 3, 4, 7, 8), saying:

> "These settlements having been made directly with the libelants and without notifying their counsel. How desperate the needs of these men, what arguments were used with them to persuade them to forego those rights which the lower court held them entitled to claim, we have no means of knowing" (Appellees' Reply, p. 4).

All this is manifestly outside the record, which simply shows (Apostles, pp. 9 to 11) that on certain dates certain libelants filed acceptances of tender, and thereafter at various intervals filed satisfactions. The acceptances of tender related to the *wages* which Mr. Gerber had tendered and deposited in court. The satisfactions related to the disputed *penalty* and the *transportation* and *subsistence* awarded by the decree. These are two separate matters which libelants' proctor now attempts to confuse (Appellees' Reply, pp. 3, 4, 7). While we see no object in arguing this case on matters so far outside the record, it may not be out of place to put the facts before the court.

The acceptance of the wages to which we referred in our opening brief (Appellants' Brief, p. 37) was conceded by libelants in their main brief and at the oral argument and is now questioned for the first time (Appellees' Reply, p. 3). The acceptance of tender filed June 2nd, 1921, under which a majority of the libelants accepted their wages, as well as that for other libelants filed on May 24th, were prepared by their proctor. It is our information also that the acceptances filed on June 7th, 17th and 22nd were also prepared by libelants' proctor. In any event, neither the

appellants nor ourselves had anything to do with the preparation of these acceptances or with the drawing of the wages, except that we were present in the office of the clerk on May 24th when the first acceptance was filed.

The situation in regard to the satisfactions is slightly different. Shortly after May 24th, 1921, and prior to the entry of the decree, we discussed with a representative of libelants' proctor and with certain of libelants themselves, the desirability of settling this wholly unprofitable litigation. At the instance of the representative of libelants' proctor it was then arranged that an interview take place at Mr. Gerber's office, at which an effort might be made to settle the dispute. In accordance with this arrangement certain of libelants appeared at Mr. Gerber's office, and during the discussion Mr. Gerber made a proposition of settlement which seemed to him fair. The libelants did not accept the proposition at that time. Some days later several of libelants called at Mr. Gerber's office and asked whether this proposition was still open. Thereafter from time to time various libelants called at Mr. Gerber's office to receive payment in accordance with this proposition and signed the satisfactions which are on file in the District Court. No effort was made to induce libelants to make the settlement and no arguments were used. In certain instances we know personally that they were urged individually to obtain the advice of their proctor before making the settlement.

It will be noted that in each instance the tender was accepted and the wages paid before the filing of the satisfaction, the interval being in some cases very considerable (*e. g., Crawford,* May 24th to July 7th; *Spencer,* June 7th to July 27th). As soon as these men filed their acceptances, the result the desire for which proctor for libelants now imputes to Judge Neterer (Appellees' Reply, p. 7), was attained, the men had obtained their wages and the question of the penalty was left open. As proctor for libelants puts it, it was then

> "beyond the power of the appellants to trade on the desperate financial condition of the crew and attain what, we think, amounted to an unconscionable advantage over these unfortunate men" (Appellees' Reply, p. 7).

Relieved of their financial embarrassment by their ability to collect the wages which had been tendered to them more than a month previously, these libelants were in a position to negotiate at arm's length with Mr. Gerber, and having done so to make what seemed to them a proper settlement. The satisfactions (not shown in the record, but filed in the District Court) in each case recite the amount actually paid in settlement. An inspection will show that the settlement was a liberal one.

B.

Appellants' Argument.

FIRST: THE PENALTY.

I. Under no circumstances can any penalty be imposed for any period subsequent to April 27, 1921, the date of the tender to libelants, under which more was deposited in the registry than was subsequently awarded to libelants as wages.

(Appellants' Brief, p. 17; Appellees' Brief, pp. 7-10, 32; Appellants' Supplemental Brief, p. 5; Appellees' Reply, pp. 5-8.)

Through inadvertence, libelants' proctor has failed to apprehend our views of *Vincent v. United States,* 272 Fed. 889 (Appellants' Supplemental Brief, p. 5; Appellees' Reply, p. 5). We agree with libelants' proctor that the case holds that the receipt of the full wages up to the date of the tender was not a waiver of any penalty for the intervening period.

Similarly, libelants' proctor has misapprehended our understanding of the terms of the tender made by Mr. Gerber (Appellants' Supplemental Brief, pp. 5-6; Appellees' Reply, p. 6). We agree with the thought libelants' proctor evidently attempts to express when he says that this tender

> "neither expressly nor by implication waives any rights which the appellees may have had to further prosecute their claims for the additional wages which they are claiming" (Appellees' Reply, p. 6).

As pointed out already (Appellants' Supplemental Brief, pp. 5-6), it necessarily follows from the foregoing that libelants could have accepted the tender

made by Mr. Gerber, which covered wages up to March 17th, without any prejudice to their claim that they were entitled to the penalty for the intervening period. The only reason offered in libelants' main brief why they did not accept the tender was that, if they had,

> "they would have been without any remedy for the time they had lost from March 17th to April 27th" (Appellees' Brief, p. 8).

The position now taken by libelants, therefore, on these two points is directly contrary to the position stated in their main brief.

Again we agree with libelants' proctor that the case of *Pacific Mail Steamship Company v. Schmidt,* 241 U. S. 245-250 (Appellants' Brief, p. 19; Appellants' Supplemental Brief, p. 6),

> "goes no further than to hold that the ship-owner has a right to delay the payment of wages and the penalty which attaches for nonpayment of wages pending an appeal from the decree of the District Court" (Appellees' Reply, p. 6).

To support our position, however, it is not necessary to go further than this, or even to go as far as this. Surely if an employer may contest the right of seamen to the penalty *after* a court has held the penalty due, he is entitled to contest it before there has been any such ruling, and certainly, if he is entitled pending the contest to withhold both the wages admittedly due and the penalty he is contesting, without incurring an additional penalty, there can be no question as to the application of an additional penalty where he offers to

pay the wages due and merely contests the penalty itself. We submit, therefore, that the case in question is controlling of this phase of the case at bar.

In discussing the agreement of May 17th, that the penalty should cease to run on that date (Appellants' Brief, pp. 19-20; Appellees' Brief, p. 7; Appellants' Supplemental Brief, pp. 6-7), libelants' proctor has made elaborate statements (Appellees' Reply, pp. 6-8) as to his understanding of occurrences not shown by the record. This discussion, however, adds nothing material to the showing in the record itself (Apostles, pp. 239-240), which we submit sustains the position we have taken throughout.

II. No penalty should be imposed for any period subsequent to March 26, 1921, the date of the appointment of the receiver.

(Appellants' Brief, p. 20; Appellees' Brief, pp. 11-13, 19-21, 22-23; Appellants' Supplemental Brief, p. 8.)

The reply contains no discussion of this point.

III. No penalty at all should be imposed.

(a) There was sufficient cause for the delay in the payment of the wages.

1. *The financial condition of Pacific Motorship Company made the payment impossible.*

(Appellants' Brief, p. 30; Appellees' Brief, pp. 4, 13-14, 17-19, 23-26; Appellants' Supplemental Brief, p. 10; Appellees' Reply, pp. 8-9, 12.)

Libelants' discussion of *Covert v. British Brig Wexford* (Appellees' Brief, p. 28; Appellants' Supplemental

Brief, pp. 10-11; Appellees' Reply, p. 8) and of the other points already discussed under this phase of the case, adds nothing to what has already been said.

An entirely new point is now made, however (Appellees' Brief, pp. 9, 12), that the mere fact that Mr. Gerber purchased a mortgage interest in the "Benowa" is evidence that the "Benowa" was worth more than the amount of the maritime liens against her. The fact, however, that the claim of the Australian Government was an equitable mortgage for $1,625,000.00, covering eight vessels (Appellants' Brief, pp. 2-3; Apostles, pp. 303-347), shows clearly that such purchase cannot be evidence of the existence of an equity over the maritime liens on any one vessel.

2. *The dispute as to the amount of wages due justified refusal to pay until this could be adjusted.*

(Appellants' Brief, p. 37; Appellees' Brief, pp. 10-11, 31-32, 32-33; Appellants' Supplemental Brief, p. 14, Appellees' Reply, pp. 10-11, 13-14.)

We are still in the dark as to just what libelants' original claim of $10,395.83 is intended to cover. As we have pointed out (Appellants' Brief, p. 37; Appellants' Supplemental Brief, p. 15), in the libel and in the demands made on the Navy Department this sum was stated to be simply "wages". In their main brief libelants asserted "without fear of contradiction" that this sum was simply the amount actually due, adding that it included

> "the wages due, transportation and subsistence during time of transportation" (Appellees' Brief, p. 10).

We have demonstrated that this statement cannot possibly be true, setting forth the figures showing that the amount of wages, plus transportation and subsistence, in no case was equal to the amount demanded and in all cases but one was very considerably less than the amount demanded (Appellants' Supplemental Brief, pp. 16-18). When this was pointed out at the oral argument, libelants asked leave to consider the matter over the noon hour, and after that time had expired, challenged our figures in no way. Their reply, written after they have had two months in which to consider the matter, also ignores this computation entirely. Their present position is stated that:

> "This amount was to cover wages up to the time that they were due, together with transportation, and any additional amounts that may have been due under the articles, or by reason of the non-payment of the wages at the time they were due" (Appellees' Reply, p. 10).

No explanation is made as to just what these additional amounts were, or how they were computed. It is apparent, however, that libelants now attempt to construe their original demand as including something more than either wages, transportation or subsistence.

As pointed out by libelants (Appellees' Reply, pp. 10-11, 13-14), the employers in this case were dependent entirely upon libelants themselves for a statement and account as to the amount due them. It is true that

when the demand was originally made, Mr. Comyn acceded to it to the extent of assigning to libelants' proctor twelve thousand dollars ($12,000.00) out of the freight funds. This, however, was not an admission that twelve thousand dollars ($12,000.00) was due. Indeed, libelants now confirm the statement they made at the oral argument (Appellants' Supplemental Brief, p. 19), saying:

> "Nor would this amount have been paid, but was only to have been withheld subject to the amount due the crew being paid out of said sum" (Appellees' Reply, p. 10).

3. *The acceptance by libelants of the assignment of freight money made it unnecessary for Pacific Motorship Company to pay libelants from some other source.*
(Appellants' Brief, p. 39; Appellees' Brief, pp. 4-6, 33-34; Appellants' Supplemental Brief, p. 19; Appellees' Reply, pp. 9-10.)

The present argument of libelants on this point, while "charitably" disclaiming any such intention, is simply a ponderous hint that Mr. Comyn gave it "as a means of working a fraud" (Appellees' Reply, p. 10), the precise nature of which is not any more definitely explained.

Every inference to be drawn from the nature of the transaction and its surrounding circumstances is directly to the contrary. As we have said, the nature of the fraudulent purpose of Mr. Comyn is not explained. He could have had no motive whatever for perpetrating any such fraud. The corporation which he represented was at the time known to be insolvent (Appellants' Brief,

p. 3; Apostles, p. 200). Any sum out of which libelants might have been defrauded would have gone to the benefit of the holders of maritime liens and of the Commonwealth of Australia under its mortgage. Mr. Comyn had no connection with the holders of maritime liens, and at that time was being sued by the Commonwealth of Australia (Apostles, p. 300). Proctor for libelants, however, had, two days previously, entered into a contract with libelants (Apostles, p. 133), the contents of which he has refused to divulge (Apostles, pp. 145-148). As he concedes, if a valid assignment had been made and accepted by him, libelants' claim would have been limited to the wages. On the other hand, if the assignment should prove to be a nullity, their claim would be enhanced by the amount of the penalty. As we have shown (Appellants' Brief, p. 8), the amount of the penalty awarded by the lower court was almost three times the actual claim for wages. There was no defect in Pacific Motorship Company's title to the assigned funds, since Houlder, Weir & Boyd admittedly received them only as agents for Pacific Motorship Company (Apostles, p. 360), nor has it ever been claimed that Mr. Comyn did not have power to act for Pacific Motorship Company. The only infirmity in the assignment asserted by libelants relates to the form of the transaction. In making the assignment, Mr. Comyn, a layman, was dealing with libelants' proctor, learned in the law, and the assignment was made in the form suggested by the latter (Appellants' Supple-

mental Brief, p. 20; Apostles, pp. 204-205). Libelants' proctor now attacks the sufficiency of this form.

(b) There is no allegation that the delay in payment was without sufficient cause.

(Appellants' Brief, p. 42; Appellees' Brief, p. 35; Appellants' Supplemental Brief, p. 21; Appellees' Reply, pp. 15, 16-18.)

Libelants now quote *The Express,* 129 Fed. 655-656, upon which we rely and which we submit decides that such an allegation is necessary. The fact that another point was also determined in the decision does not destroy this case as authority upon the point for which we cited.

No such claim having been made in their main brief, it is not clear to us from the libelants' last sentence (Appellees' Reply, p. 15) whether they intend now to claim that such an allegation was made. An inspection of the libel, however, makes it clear that the allegations go no further than to show, as libelants' proctor now says,

> "that the men were entitled to their wages in accordance with those shipping articles" (Appellees' Reply, p. 15),

which is, of course, a very different thing from a showing that the refusal was without sufficient cause.

In discussing this matter in our opening brief we pointed out (Appellants' Brief, p. 43) that the libel showed on its face that it was prematurely filed. In their main brief and at the oral argument libelants conceded this point. An elaborate argument, however, is

now made to the contrary (Appellees' Reply, pp. 16 to 18).

The statute involved in *The Annie M. Smull,* Fed. Cas. No. 423 (Appellees' Reply, p. 16), and *The Mary,* Fed. Cas. No. 9191 (Appellees' Reply, p. 17), was materially different from that in the case at bar. The allegation there that the voyage had ended was held sufficient with- charged. The present statute, however, fixes the time out a further allegation that the cargo had been dis- for the payment of the wages definitely with relation to the time when the cargo had been discharged. Even if there were an allegation in the libel that the voyage had ended, this would not be sufficient to override the statute.

The Catalonia, 236 Fed. 554 (Appellees' Reply, p. 18), has no bearing whatever on this matter. It merely holds that a construction of the shipping articles author- izing the indefinite prolongation of the voyage by failure of the master to proceed to the port of destination named, would be unreasonable.

All doubt on the question as to whether this libel was premature or not, however, is set aside by the fact that the District Court expressly found that the voyage continued and wages were due up to March 17th, two days after the date the libel was filed.

(c) The effect of the decree is to penalize not the owners of the vessel, but those having liens upon it.

(Appellants' Brief, p. 44; Appellees' Brief, pp. 13, 22, 24, 35-36; Appellants' Supplemental Brief, p. 21; Appellees' Reply, pp. 11, 12, 16.)

In reference to the recent decision of Judge Dooling in *Sjogren v. The Moshula* (Appellants' Supplemental Brief, pp. 21-22) we said that the mortgage there involved was not a preferred mortgage. In reply libelants now say:

> "This is not a correct statement. The United States claims that the mortgage is a preferred mortgage" (Appellees' Reply, page 11).

The record in that case speaks for itself. The brief of the *amicus curiae,* upon the strength of which Judge Dooling rendered the opinion we have quoted, contains the following note:

> "*Note:* The U. S. has claimed a preferred status for its mortgage. Examination of the record shows, however, that the mortgage was only endorsed on the ship's register, on July 6, 1921, and that it was not then filed in the proper register, but upon a register showing the United States to be the owner. The U. S. not having complied with the statute, has not a preferred mortgage under Merchant Marine Act, 1920, Section 30."

The court will remember that Judge Dooling's opinion was in no respect based upon the Jones Act.

We agree with libelants, that maritime liens are preferred over common law liens and that a maritime claimant may petition for payment out of the proceeds in the hands of the marshal (Appellees' Reply, p. 16). Our position is simply that, as in *The Moshula,* the court in determining whether it shall award a maritime lien for the penalty provided by R. S. 4529, must consider all the liens, maritime as well as common law liens, in

order to ascertain whether the awarding of a lien for the penalty will have the effect of imposing the penalty upon the party named in the statute as bound to pay it.

IV. The amount of the penalty is computed wrongly.

(Appellants' Brief, p. 46; Appellants' Supplemental Brief, p. 24; Appellees' Reply, pp. 12-13.)

As we have said (Appellants' Supplemental Brief, p. 24) libelants conceded this point in their brief and at the argument. In their reply, however, they now suggest that the matter should have been presented by objections made to the trial judge. Under the rules of this court these objections are not properly a part of the record, and, therefore, were not included in the apostles. That fact is, however, that elaborate objections were made in writing, and that while Judge Dooling was unable to afford counsel the opportunity to explain them, we did advise the representative of libelants' proctor that his computation was erroneous in this respect, and upon his refusal to correct his proposed decree, advised him that we would be compelled to bring the matter to this court.

Second: Libelants should have accepted the transportation offered by Gerber and not recovered money in lieu thereof.

(Appellants' Brief, p. 47; Appellees' Brief, pp. 36-37; Appellants' Supplemental Brief, p. 24.)

The reply contains no discussion of this point.

Third: It was improper to enter a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels, under which the vessel is held by the marshal, and without notice to these libelants and intervening libelants.

(Appellants' Brief, p. 49; Appellees' Brief, pp. 37-39; Appellants' Supplemental Brief, p. 25; Appellees' Reply, p. 13.)

Libelants now reiterate their statement, based entirely on matters outside the record, that they notified Mr. Resleure and Messrs. Goodfellow, Eells, Moore & Orrick. As these gentlemen have no recollection to that effect we can do no more than refer to our supplemental brief on this point.

(Appellants' Supplemental Brief, pp. 25-26.)

The new suggestion is also made that all of these gentlemen are concluded because they failed to appear at the time of the purported proclamation made under the Spencer libel. As we have said, the vessel was in the hands of the marshal at the time the Spencer libel was filed (Appellants' Brief, p. 49); it was impossible for the marshal to seize it again (Appellants' Brief, p. 54) and the purported seizure and proclamation could not possibly furnish a ground of jurisdiction *in rem.* Surely it cannot be the contention of libelants' proctor that the failure of the senior libelant to appear at a proclamation made under a junior libel waives all the claims of the senior libelant. If so, it would seem that the libelants herein have lost all their rights in the "Benowa" because they failed to appear at the proclamation made under the libel of Captain Renny (Appellants' Brief, p. 50; Apostles, pp. 296, 297) although the latter never had a valid maritime lien.

C.

Unrelated Matters.

FIRST: PROVISIONS.

(Appellees' Brief, pp. 2-3, 30-31; Appellants' Supplemental Brief, p. 26.)

As this matter is not discussed, we take it that libelants concede that the whole question of provision is beside the point.

SECOND: DEMANDS UNDER R. S. 530.

(Appellees' Brief, pp. 3-4, 14-16, 39; Appellants' Supplemental Brief, p. 27; Appellees' Reply, p. 17.)

Libelants now concede that the destination of the vessel was changed to San Francisco as late as March 12th (Appellees' Reply, p. 17). While they reiterate their assertion that demands for wages were made by the crew subsequent to that time, they cite nothing in the record to support this assertion, nor do they discuss our statement (Appellants' Supplemental Brief, p. 28), that there is nothing in the record to support it.

In view of the matters discussed in the earlier briefs on file, and of the foregoing, it is respectfully submitted that the decree must be reversed.

Dated, San Francisco,
January 11, 1922.

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